Hoo Kok Chong & Anor v Yong Tim

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–02–446 OF 1998

MOKHTAR SIDIN, ABDUL HAMID MOHAMAD AND MOHD NOOR AHMAD JJCA

9 DECEMBER 2003

Evidence — Burden of proof — Fraud — Standard of proof — Criminal standard of beyond reasonable doubt does not apply to civil suits alleging fraud — Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241 (FC)

Land Law — Indefeasibility of title and interests — Fraud — Standard of proof — Whether on balance of probabilities — Whether registered owner was a bona fide purchaser for valuable consideration — Whether registered owner acquired indefeasible title — National Land Code 1965 s 340(3)

Hor Choy ('the deceased') was the grandfather of the plaintiffs and the registered owner of certain lands in Selama, Perak. The deceased died in November 1969. The plaintiffs' father then took over control of the lands and purportedly allowed the defendant the use thereof. In 1984 the plaintiffs approached the defendant for the return of the lands. The defendant refused, claiming he was the legal owner of the lands, having purchased the same from the deceased in June 1969 for valuable consideration. There was admittedly no sale and purchase agreement signed between the parties and there was no written receipt in respect of the alleged payment of consideration. However the defendant claimed that after waiting for some three years for the plaintiffs' father to hand over the issue document of title to him, he had in 1976 applied for and obtained titles in continuation in respect of the lands. These titles recognized him as the registered owner of the lands and he was entitled to indefeasible title to the lands. The plaintiffs checked all the entries in the presentation book for 1969 and found no record of any such dealing in respect of the lands. The plaintiffs sought, inter alia, a declaration that the purported transfer of the lands from the deceased to the defendant was null and void. The trial judge, holding that the plaintiffs had failed to prove fraud against the defendant beyond reasonable doubt, dismissed the plaintiffs' claims. The plaintiffs appealed. During the appeal, the plaintiffs sought to adduce fresh evidence in the form of a letter from the Chief Deputy District Officer, Selama confirming that the original register documents of title to the lands had been removed from the possession of the Selama Land Office, that a transfer of the lands to the defendant had been registered under Presentation No 71/75 Vol 1 Folio 63 wef March 1975, and that the instrument of transfer ('the Form 14A') relating to this presentation had also been removed from the register of documents for 1975 and lost from the possession of the Selama Land Office. The plaintiffs also sought to adduce as evidence a letter from the Director of Surveys and Mapping, Perak stating that his department could not trace the original file on the first survey done on the lands in 1915. Attached to this letter was evidence that, for the purpose of

the issuance of the titles in continuation, the defendant had declared that he had lost the issue documents of title to the lands. The defendant objected to the admission of such fresh evidence on appeal.

Held, permitting the fresh evidence to be adduced and allowing the appeal:

(1) The law on the admission of further evidence in the hearing of an appeal was governed by r 7(3A) of the Rules of the Court of Appeal 1994. The application to adduce further evidence must, in this case, be considered in the light of the evidence revealed at the trial. The uncertainties in the evidence were due not only to the non-availability of the pertinent records in the Land Office but also by the averment of the defendant at the trial that he had bought the lands from the deceased in June 1969 (see paras 4 and 5).

(2) It was thus reasonable to expect that the plaintiffs would focus their search on entries in the presentation book only in respect of dealings for the year of 1969. To require them to carry out a search through the entries made from 1969 to 1975 would be illogical and unjust. Of course, if the plaintiffs had had prior knowledge of the transaction in March 1975, they would have had to carry out this task. Having regard to the uncertainties in the evidence, and the reasons for such uncertainty, reasonable diligence would not have made this new evidence available to the plaintiffs at the hearing before the High Court (see para 5).

(3) The extract of the relevant presentation, being a public document, bore the stamp of truth, that the alleged transfer was only registered in March 1975. Thus the claim by the defendant that he bought the lands in 1969 and became the legal owner since then could not be true. Even on the assumption that the Form 14A was executed, as the defendant had claimed, in June 1969, he could not have become of the legal owner, but only the beneficial owner, since 1969 because the non-registration of the transfer (see para 5).

(4) Since the Form 14A had been removed from the register of documents for 1975 and lost from the possession of the Land Office, the non-existence of any sale and purchase agreement and the absence of any receipt for the payment of the consideration inclined to the belief that the transfer of the lands to the defendant could only have been transacted in or about March 1975. Presentation No 71/75 fortified such belief since only the usual registration fee had been collected, not the penalty for any late registration. The deceased could not have been a party to the execution of such a form because he had died some six years earlier (see para 5).

(5) The defendant had deposed that after payment of the purchase price he waited for about three years for the plaintiffs' father to hand over the titles to the lands. Then he made a statutory declaration and applied for new land titles from the Land Office. The defendant had however declared that he had lost the original issue documents of title to the lands. If this was true he would not have waited for the

plaintiffs' father to hand them over to him. There was no evidence that the defendant had verified with the plaintiffs' father that the land titles were lost before he made such declaration (see para 5).

(6) Although being the registered proprietor of the lands made the defendant's title to the lands indefeasible, such indefeasibility could be defeated by proof of fraud or misrepresentation to which the defendant was privy or a party. The trial judge applied the wrong standard of proof on fraud. The proper test is that of a balance of probabilities (see para***); *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 (FC) followed; *Saminathan v Pappa* [1981] 1 MLJ 121 (PC) not followed (see paras 6 and 7).

(7) While there was no evidence that the defendant was involved in the removal of the original register documents of title from the Land Office and in the removal of the Form 14A from the register of documents for 1975, the defendant had, in obtaining the titles in continuation to the lands, misrepresented the titles as having been lost by him. Coupled with the fact that the defendant could not have been the legal owner of the lands in 1969 and that the deceased could not have been a party to the execution of the Form 14A, having died some six years earlier, the plaintiffs had proved fraud against the defendant on a balance of probabilities. For the same reason, the defendant could not be regarded as a purchaser in good faith and for valuable consideration (see para 8).

[**Bahasa Malaysia summary**

Hor Choy ('si mati') adalah datuk kepada plaintif dan tuanpunya berdaftar hartanah di Selama, Perak. Si mati meninggal dunia pada bulan November 1969. Bapa plaintif kemudiannya telah mengambil alih kawalan hartanah tersebut dan mendakwa telah membenarkan defendan menggunakannya. Pada tahun 1984 plaintif telah meminta defendan mengembalikan hartanah tersebut. Defendan enggan membuat demikian, mendakwa bahawa beliau adalah tuanpunya berdaftar hartanah tersebut, setelah membelinya dari si mati dalam bulan Jun 1969 dengan balasan berharga. Tidak dinafikan tiada sebarang perjanjian jual beli ditandatangani di antara pihak-pihak dan tiada resit bayaran balasan yang didakwa. Walau bagaimanpun defendan mendakwa bahawa setelah menunggu selama tiga tahun bagi bapa plaintif menyerahkan kepadanya suratan hak milik yang dikeluarkan, beliau telah dalam tahun 1976 memohon dan mendapatkan suratan hak milik sambungan berkenaan hartanah tersebut. Suratan hak milik ini mengiktirafkannya sebagai tuanpunya berdaftar hartanah tersebut dan haknya itu tidak dapat disangkal. Plaintif telah memeriksa segala pencatatan dalam buku perserahan bagi tahun 1969 dan mendapati tiada sebarang rekod urusan berkaitan hartanah tersebut. Plaintif memohon, antara lain, suatu deklarasi bahawa pindah milik hartanah yang didakwa itu dari si mati kepada defendan adalah tidak sah dan terbatal. Hakim perbicaraan, mendapati bahawa plaintif telah gagal membuktikan fraud ke atas defendan ke tahap melebihi keraguan munasabah, telah menolak tuntutan plaintif. Plaintif telah merayu. Semasa rayuan itu, plaintif

memohon agar dibenarkan mengemukakan keterangan lanjut yang merupakan sepucuk surat dari Ketua Penolong Pegawai Daerah, Selama mengesahkan bahawa salinan asal suratan daftar hak milik kepada hartanah tersebut telah dikeluarkan dari milikan Pejabat Tanah Selama, bahawa suatu pindahmilik hartanah tersebut kepada defendan telah didaftarkan di bawah No Perserahan 71/75 Jilid 1 Folio 63 berkuatkuasa March 1975, dan bahawa suratcara pindahmilik tersebut ('Borang 14A') berkaitan perserahan ini juga telah dikeluarkan dari daftar suratcara bagi tahun 1975 dan hilang dari milikan Pejabat Tanah Selama. Plaintif juga ingin mengemukakan sebagai keterangan sepucuk surat dari Pengarah Ukur dan Pemetaan, Perak yang menyatakan bahawa jabatannya tidak dapat mengesan fail asal ukuran pertama yang dibuat ke atas hartanah tersebut pada tahun 1915. Secara lampiran kepada surat ini adalah keterangan bahawa, bagi maksud pengeluaran suratan hak milik sambungan, defendan telah membuat surat akuan bahawa suratan hak milik yang dikeluarkan telah hilang. Defendan membantah pengemukaan keterangan lanjut semasa rayuan.

Diputuskan, membenarkan keterangan lanjut itu dikemukakan dan membenarkan rayuan itu:

(1) Undang-undang pengemukaan keterangan lanjut semasa pendengaran rayuan ditentukan oleh k 7(3A) Kaedah-kaedah Mahkamah Rayuan 1994. Permohonan pengemukaan keterangan lanjut harus, dalam kes ini, dipertimbangkan berasaskan keterangan yang didedahkan semasa perbicaraan. Ketidaktentuan keterangan wujud bukan sahaja akibat ketiadaan rekod yang wajar di pejabat tanah tetapi juga akibat dakwaan defendan semasa perbicaraan bahawa beliau telah membeli hartanah tersebut dari si mati dalam bulan Jun 1969 (lihat perenggan-perenggan 4 dan 5).

(2) Maka adalah munasabah plaintif menumpukan carian mereka ke atas pencatatan dalam buku perserahan hanya bagi urusan yang didaftarkan pada tahun 1969. Adalah tidak berlojik dan tidak adil jika mereka diperlukan membuat carian pencatatan yang dibuat dari 1969 sehingga 1975. Tentunya, sekiranya plaintif tahu akan urusan pada bulan March 1975, mereka perlu menjalankan tugas ini. Memandangkan ketidaktentuan keterangan, dan sebab-sebab bagi ketidaktentuan itu, ketekunan munasabah tidak dapat mendedahkan keterangan ini kepada plaintif semasa perbicaraan(lihat perenggan 5).

(3) Petikan perserahan tersebut, sebagai suatu suratcara umum, memberikan tanda kebenaran, bahawa pindahmilik hartanah tersebut hanya didaftarkan pada bulan Mac 1975. Maka tuntutan defendan bahawa beliau telah membeli hartanah tersebut dalam tahun 1969 dan menjadi tuanpunya berdaftarnya sejak itu tidak mungkin benar. Walaupun di atas andaian bahawa Borang 14A tersebut telah ditandatangani, seperti didakwa defendan, dalam bulan Jun 1969, beliau tidak mungkin telah menjadi tuanpunya berdaftar, tetapi hanya tuanpunya berhak, sejak 1969 memandangkan ketidak pendaftaran pindahmilik tersebut (lihat perenggan 5).

(4) Memandangkan yang Borang 14A itu telah dikeluarkan daripada daftar suratcara bagi tahun 1975 dan hilang daripada milikan pejabat tanah, maka ketidak wujudan sebarang perjanjian jual beli dan ketiadaan sebarang resit bayaran balasan memihak kepada kepercayaan bahawa pindah milik hartanah tersebut hanya dilakukan pada atau lebih kurang pada bulan Mac 1975. Perserahan No 71/75 mengekalkan kepercayaan ini memandangkan hanya yuran pendaftaran yang biasa telah dikutip, bukannya sebarang denda lewat. Si mati tidak mungkin telah menandatangani Borang 14A seperti itu sebab ia telah meninggal dunia hampir enam tahun sebelumnya (lihat perenggan 5).

(5) Defendan telah mendeposkan bahawa setelah bayaran pembelian dibuat beliau telah menunggu selama tiga tahun bagi bapa kepada plaintif menyerahkan suratan hak milik kepada hartanah tersebut. Kemudian beliau telah membuat surat akuan dan memohon suratan hak milik baru dari pejabat tanah. Defendan sebaliknya mengakui beliau telah hilang suratan hak milik yang dikeluarkan ke atas hartanah tersebut. Jika ini benar, beliau tidak mungkin menunggu bapa plaintif menyerahkan suratan hak milik itu kepadanya. Tiada sebarang keterangan bahawa defendan telah mengesahkan dengan bapa plaintiff bahawa suratan hak milik yang dikeluarkan telah hilang sebelum beliau membuat akuan itu (lihat perenggan 5).

(6) Walaupun sebagai tuanpunya berdaftar hartanah tersebut memberikan defendan hak yang tidak boleh disangkal, hak yang tidak boleh disangkal itu boleh ditewaskan dengan bukti fraud atau or salah representasi yang dijalankan atau diketahui defendan. Hakim perbicaraan telah memakai tahap bukti yang salah bagi fraud. Ujian yang wajar adalah di atas keseimbangan kebarangkalian. *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 FC (diikut), *Saminathan v Pappa* [1981] 1 MLJ 121 PC (tidak diikut) (lihat perenggan-perenggan 6 dan 7).

(7) Walaupun tiada sebarang keterangan bahawa defendan terlibat dalam pengalihan salinan asal suratan daftar hak milik dari pejabat tanah dan dalam pengalihan Borang 14A dari daftar suratcara bagi tahun 1975, defendan telah, dengan mendapatkan suratan hak milik sambungan kepada hartanah tersebut, salah representasikan bahawa suratan hak milik telah dihilangnya. Bergabung dengan fakta bahawa defendan tidak mungkin menjadi tuanpunya berdaftar hartanah tersebut pada tahun 1969 dan bahawa si mati tidak mungkin telah menandatangani Borang 14A tersebut, memandangkan beliau telah meninggal dunia hampir enam tahun sebelumnya, plaintif telah berjaya membuktikan fraud terhadap defendan atas keseimbangan kebarangkalian. Bagi sebab-sebab yang sama, defendan tidak dapat dianggap sebagai seorang pembeli bona fide dan bagi balasan berharga (lihat perenggan 8).]

Notes

For cases on fraud alleged in civil cases, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 439–454.

For cases on fraud on indefeasibility of title and interests, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2667–2690, 2731.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241 (folld)
Saminathan v Pappa [1981] 1 MLJ 121 (not folld)

Legislation referred to

National Land Code s 340(1), proviso to s 340(3)
Rules of the Court of Appeal 1994

Appeal from: Civil Case No 22–4–1992(91) (High Court, Taiping)

A Silvanathan (M Mathialagan with him) (Madhi Param & Co) for the plaintiffs/appellants.
Ng Poh Tan (Ng Whui Cheng with him) (Ng Poh Tat & Co) for the defendant/respondent.

Mohd Noor Ahmad JCA (delivering jugdment of the court):

[1] In this action, the plaintiffs sought for a declaration that the transfer of two pieces of land held under EMR 1265 Lot 1346 and EMR 1266 Lot 1347, Mukim of Selama, Perak ('the Lands') from one Hor Choy ('the deceased') to the defendant was null and void and for other consequential orders. The learned judge of the High Court dismissed the claims with costs. Hence, this appeal. We heard the appeal on 14 January 2002. However, the hearing was adjourned to a date to be fixed to enable the plaintiffs' solicitors to verify certain facts. The hearing was resumed on 7 February 2003. At the resumed hearing, the plaintiffs' counsel moved a motion to adduce further evidence which was objected by the defendant. We allowed the motion with no order as to costs. Ultimately, we allowed the appeal with costs here and below and ordered the deposit to be refunded. Here are our reasons.

[2] Briefly, the deceased was the grandfather of the plaintiffs. The registered owner of the Lands was the deceased. It was alleged that on 30 December 1966, the deceased executed a trust deed in favour of the plaintiffs who were then minors. The trustee was the deceased. Under the trust deed, upon the death of the deceased the Lands would be transferred to the plaintiffs; however, during his lifetime he was entitled to sell the Lands. On 26 November 1969, the deceased died. Thereafter, the plaintiffs' father ('PW3') took over the control of the Lands. It was alleged that the plaintiffs' father allowed the defendant to use the Lands. In 1984, after attaining the age of majority, the plaintiffs approached the defendant for the return of the Lands. The defendant refused claiming that he had purchased the Lands from the deceased in Jun 1969 for a consideration of RM10,400 and that he was the legal owner of the Lands since 1969. The

defendant also claimed that he had applied for and obtained titles in continuation in respect of the Lands in 1976, nos GM 316 and GM 317, respectively.

[3] (1) The further evidence sought to be adduced by the plaintiffs consists of:

(a) a letter dated 6 February 2002 from the Ketua Penolong Pegawai Daerah, Selama confirming:

(i) the original titles to the Lands had been removed from the Registered Document of Title Book ('the RDT') and lost from the possession of the Land Office;

(ii) the transfer of the Lands to the defendant was registered on 7 March 1975 at 10.15am as evident from the Presentation No 71/75 obtained from the Presentation Book of 1975. An extract of the Presentation was attached to the letter; and

(iii) Form 14A relating to the transfer vide Presentation No 71/75 Jil 1 Fol 63 had also been removed from the Register of Documents of 1975 and lost from the possession of the Land Office; and

(b) a letter dated 11 February 2002 from Pengarah Ukur dan Pemetaan, Perak stating that the Department could not trace the original file on the first survey done on the Lands in 1915. However, an extract of the Confirmed Plan of the lots in respect of the Lands and an extract of the Gazette Notifications nos 838 and 839 dated 19 November 1995 were attached to the letter. The Gazette Notifications are in respect of the exercise of power by the Land Administrator under s 168(a) of the National Land Code ('the NLC'). They reveal that the issued original titles of the Lands were declared lost by the defendant for the purpose of the issuance of the titles in continuation.

(2) The learned counsel for the defendant in objecting to the motion contended that the plaintiffs failed to show that the new evidence could not have been obtained with reasonable diligence for use at the trial and that had the new evidence been adduced at the trial it would not have had or would not have been likely to have had an important influence on the result of the case.

(3) Before we proceed to consider the issue of further evidence, certain pertinent facts as revealed in evidence at the trial need to be highlighted. They are:

(i) PW1, the Assistant Land Administrator admitted that he had no personal knowledge about the documents he brought from the Selama Land Office for the purpose of the trial. One of the documents he brought was the Presentation Book. He deposed that he had checked all the entries in the Presentation Book from Presentation No 8948 dated 2 January 1969 to Presentation No 9417 dated 30 December 1969 and found that there was no record of any transfer of the Lands

during that period. Whatever document of dealings presented must be registered in the Presentation Book. If there was any transfer in June 1969 and if the transaction was executed before the Assistant Land Administrator, the transfer must be registered in the Presentation Book. It would also be registered in the RDT. Further, he deposed that the title of the Lands appeared in the Current Rent Roll which indicated that the titles to the Lands existed but the original titles to the Lands were missing from the RDT which meant that the titles had been tampered with in the sense that they had been removed from the RDT. He also deposed that, from the titles in continuation, the defendant was the registered owner of the Lands on 13 February 1976. On the procedure relating to the issuance of title in continuation he stated that the applicant must apply to the Land Office supported by a statutory declaration stating the reason for the application. The application would then be submitted to the Survey Department. The submission did not contain the name of the registered owner but only the lot number, grant number and the location of the land were stated therein. Subsequently, the Survey Department would send a new title in blank to the Land Office. The blanks would then be filled up by the registration clerk with the particulars obtained from the issued original title kept in the relevant file. If it was declared lost the particulars would be obtained from the original title in the RDT. Finally, if everything was in order, the new title would be signed by the Land Administrator. In this particular case, there was no record of the application including the statutory declaration made by the owner of the Lands for the issuance of the title in continuation.

(ii) the defendant claimed that he purchased the Lands from the deceased in June 1969;

(iii) there was no sale and purchase agreement signed between the defendant and the deceased in respect of the purchase; and

(iv) there was no written receipt in respect of the alleged payment of RM10,400 for the consideration.

[4] The law on the admission of further evidence in the hearing of an appeal is governed by r 7(3A) of the Rules of the Court of Appeal 1994. It provides that further evidence shall not be admitted unless the court is satisfied that:

(a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.

[5] We are of the view that the application to adduce further evidence in this case must be considered in the light of the aforesaid evidence revealed

at the trial. It is manifestly evident that there are real uncertainties in the evidence relating, in particular to the alleged transfer of the Lands from the deceased to the defendant in June 1969 and the issuance of the title in continuation to the defendant. The uncertainties are due not only to the non-availability of the pertinent records in the Land Office and the lack of personal knowledge on the part of PW1 about the documents tendered in court but also by the averment of the defendant in paras 4 and 6 of the statement of defence that he bought the Lands from the deceased in June 1969 which he deposed to the same effect at the trial. To us, what matters most is that averment of the defendant. The averment gave the specific time of the purchase. That being the case, it is reasonable to expect that, at the preparatory stage before the trial, the plaintiffs or their solicitors had to focus their search in the Presentation Book at the Land Office only in respect of entries pertaining to all dealings for the year of 1969. To place a burden on them to carry out the search through the entries made in the Presentation Book from 1969 to 1975 would be illogical and unjust because of the tremendous task they had to do for which they did not expect to do or need not do. Of course, if they have had prior knowledge of the transaction of 7 March 1975 they had to carry out that task. That accounts for the need to adduce further evidence as stated in para 3(1)(a)(ii) and (iii) above. Therefore, we are satisfied that although this new evidence was in existence at the time of the hearing before the High Court, reasonable diligence would not have made it available to the plaintiffs. With regard to further evidence as stated in para 3(1)(a)(i) above, this is merely a confirmation of PWl's evidence already adduced at the trial. And the further evidence as stated in para 3(1)(b) above is just a confirmation of what the defendant ('DW1') deposed at the trial. Having regard to the uncertainties in the evidence as aforesaid and the aforesaid reasons for the uncertainties we are also satisfied that reasonable diligence would not have made this new evidence available to the plaintiffs at the hearing before the High Court. Next, we have to consider whether the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the learned judge. As stated earlier, the defendant claimed that he bought the Lands from the deceased in June 1969 and that he was the legal owner of the Lands since then; and PW1, who checked all the entries in the Presentation Book for the whole year of 1969 found no record of such dealing in respect of the Lands. However, from the new evidence as stated in para 3(1)(a)(ii) and (iii), it is manifestly evident that the alleged transfer of the Lands to the defendant was registered only on 7 March 1975 at 10.15am, nearly some six years later. To our mind, the extract of the relevant Presentation, being a public document which was produced from proper custody, bears the stamp of truth, that is to say, the alleged transfer was registered on 7 March 1975. Therefore, the claim by the defendant as deposed in evidence that he bought the Lands in 1969 and that he became the legal owner of the Lands since then could not have been true. Even on the assumption that Form 14A was executed for the purpose of the transfer in June 1969, as the defendant claimed, he could not have been the legal owner but only beneficial owner of the Lands since 1969 because the non-

registration of the transfer under the NLC does not confer on him the legal ownership to the Lands. However, by reason of (i) the fact that the relevant Form 14A had been removed from the Register of Documents of 1975 and hence, its loss from the possession of the Land Office, (ii) the non-existence of any sale and purchase agreement in respect of the purchase of the Lands by the defendant and (iii) the absence of any receipt for the payment of the consideration, we are inclined to believe that the transfer of the Lands to the defendant could not have been transacted in June 1969, as claimed by the defendant but sometime later, on or about 7 March 1975. We are fortified in our belief by the fact gathered from Presentation No 71/75 (re-extract mentioned in para 3(1)(a)(ii) above) that only the registration fee of RM20 was charged for the two titles but not the penalty for late registration as compared to Presentation No 75/75 in the same extract where it is shown that the registration fee of RM10 was charged for one title and a further RM10 was charged for 'Bayaran Lambat'. That being the case, the deceased could not have been a party to the execution of Form 14A, as the vendor, because he had died about six years earlier. On the issuance of the title in continuation, the defendant deposed that after the payment of the purchase price he waited about three years in order to get the titles to the Lands but PW3 did not hand over the land titles, to him and thereafter, he made a statutory declaration and applied for new land titles from the Land Office, However, as revealed by the extract of the Gazette Notifications as mentioned in para 3(1)(b) above, the defendant declared that the issued original titles to the Lands had been lost. This could not be true because he ought to have been aware that the land titles must have been kept by PW3 otherwise he would not have waited for three years for PW3 to hand them over to him. Further, there is no evidence that he had verified with PW3 that the land titles were lost before he made such declaration. Therefore, for the aforesaid reasons we are satisfied that the new evidence, had it been available at the trial, would have had a determining influence upon the decision of the learned judge.

[6] Under s 340(1) of the NLC, being the registered proprietor of the Lands, the title of the defendant in the Lands becomes indefeasible. However, under sub-s (2)(a) of the section, the indefeasibility can be defeated by proof of fraud or misrepresentation to which the defendant was a party or privy. The plaintiffs had alleged fraud against the defendant based on the following particulars as set out in para 5 of the statement of claim:

(a) no sale of land by the deceased to the defendant in 1969;

(b) the deceased died in 1969;

(c) no consideration was given to the deceased;

(d) the defendant had forged the signature of the deceased; and

(e) the defendant, through fraud, had the Lands transferred into his name.

[7] The learned judge held that the plaintiffs failed to prove fraud beyond reasonable doubt against the defendant. He relied on the authority of *Saminathan v Pappa* [1981] 1 MLJ 121, a Privy Council case. With due

respect, the learned judge applied the wrong standard of proof on fraud. The proper test is that on a balance of probabilities (see *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241).

[8] Now, we have to consider whether, in the light of the new evidence, the plaintiff had succeeded in proving fraud on the balance of probabilities against the defendant. We do realize that there is no evidence at all that the defendant was responsible for or has had a hand in the removal of the original titles to the Lands from the RDT and the removal of Form 14A relating to the transfer vide Presentation No 71/75 Jil 1 Fol 63 from the Register of Documents of 1975. However, he had a hand in obtaining the titles in continuation to the Lands wherein, as aforesaid, he had misrepresented in his statutory declaration that the land titles had been lost. On this fact coupled with the facts, as aforesaid, that he could not be the legal owner of the Lands since 1969 and that the deceased could not have been the party to the execution of Form 14A, as the vendor, because he had died about six years earlier, we are satisfied that the plaintiffs had succeeded in proving fraud on the balance of probabilities against the defendant. Further, for the same reason, the defendant could not be regarded as a purchaser in good faith and for valuable consideration under the proviso to s 340(3) of the NLC.

[9] Although the decision of the learned judge was based on the findings of fact and credibility, we are compelled to interfere with his decision because he had erred on the standard of proof on fraud and in the light of the new evidence.

Fresh evidence permitted to be adduced and appeal allowed.

Reported by Sivapragasam Kumaran